78-1324

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. A-655

WILLIE JAMES JACKSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CASES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Willie James Jackson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 28, 1978.

CITATIONS TO OPINIONS BELOW

The oral rulings of the District Court are unreported; portions of the trial transcript containing these rulings are printed in Appendix B, infra page 1b. The order of the Court of Appeals, printed in Appendix B, infra page 8b, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered December 28, 1978. Petitioner was granted an extension of time to and including February 26, 1979, to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court committed reversible error in ruling that the identity of a government informant, known to the petitioner and in the public court record, could not be disclosed to the jury, thereby preventing petitioner from presenting evidence concerning the character of the informant.

2. Whether petitioner was denied due process of law by failing to receive effective assistance of counsel in his appeal.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Eastern District

of Michigan, Southern Division, on a two-count indictment charging violations of 21 U.S.C. § 841 (a)(1). Petitioner was convicted of possession with intent to distribute, and distribution of 5,000 tablets (approximately 140 grams) of phencyclidine (PCP), a Schedule III narcotic drug. Now a graduate student, petitioner then was an undergraduate at the University of Michigan.

The allegations in the indictment arose out of an incident which occurred on the evening of October 30, 1975. At approximately 7:20 p.m., a goverment informant and Mr. James D. Stepp, an agent of the Drug Enforcement Administration, went to petitioner's home for the expressed purpose of purchasing 5,000 tablets of PCP.

It was apparent from the testimony at trial that the terms of the transaction had been established in advance by someone other than Agent Stepp. Agent Stepp had neither met nor spoken to petitioner prior to that evening; however, the amount of drugs to be sold and the

overall cost ($1,575) had been determined prior to the time of the sale. The 5,000 units of PCP had been separated and counted in advance, and Agent Stepp had only $1,580 in cash in his possession at the time of the sale. He had prepared in advance a list of the serial numbers of the bills totalling that amount. The informant introduced Agent Stepp to petitioner, and was present during the entire transaction. Petitioner was arrested approximately seven months after the incident.

Both prior to and during the trial of this case, petitioner requested that the identity of the informant be disclosed to the jury. It was clear at that time that the informant was known to petitioner, that the petitioner did not wish to call the informant as a witness, and that petitioner relied for his defense on evidence about the witness which he did want to bring to the attention of the jury.

Petitioner did not request that the informant be produced to testify; rather, he asked that the identity of the informant be disclosed, so that petitioner could show that he knew the informant, that the informant had initiated this transaction with petitioner, and that this was done under circumstances which he wished to argue to the jury provided him with a defense to the charges against him. During an in camera session, counsel for petitioner informed the court that if the informant's identity was disclosed, petitioner would call witnesses who knew the informant and who could testify in support of petitioner's position regarding the informant. In ruling that the identity of the informant could not be disclosed to the jury, the court prevented petitioner from introducing evidence concerning the informant, a ruling which effectively destroyed petitioner's only defense.

The court denied all requests by petitioner to disclose the identity of the informant to the jury. The court held that the request was untimely, and that petitioner had failed to demonstrate sufficient need for disclosure. The court relied on this Court's decision in Roviaro v. United States, 353 U.S. 53 (1957), and the cases following and interpreting Roviaro.

Petitioner was convicted on November 18, 1976, after a trial by jury. Petitioner exercised his constitutional right not to testify on his own behalf and, following the trial court's ruling as to the identity of the informant, he was precluded from presenting the chief evidence and witnesses in his behalf.

On appeal to the United States Court of Appeals for the Sixth Circuit, counsel for petitioner filed a 78-page brief which attempted to raise eight grounds for reversal. The statement of facts in petitioner's brief was two paragraphs

long. Of the 75 pages of argument, all but 13 pages are reproductions of various parts of the trial transcript. The brief cited seven cases to support petitioner's arguments. In presenting each case, counsel either quoted the syllabus provided in the official reporter, or quoted verbatim, without attribution, portions of the court's opinion.

Nowhere in the argument did counsel attempt to discuss these cases or apply the principles of the cases to the particular facts of petitioner's case. Nor did counsel address the standard of review, or the question whether any error that was committed was harmless.

On December 28, 1978, the United States Court of Appeals for the Sixth Circuit affirmed petitioner's conviction. However, the court did state that it "entertains serious reservations concerning whether the balancing test of Roviaro was properly applied here." The court concluded that any error was harmless beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

1. This Court has previously discussed the balancing test which must be used to determine the applicability of the so-called "informant's privilege," under which the identity of a government informant may not be disclosed to the defendant or the jury in a criminal trial. Roviaro v. United States, 353 U.S. 53 (1957).

This Court held in Roviaro that the privilege was limited by "fundamental requirements of fairness," and that "where the disclosure of an informer's identity . . . is relevant and helpful to the defense of the accused, or is essential to the fair determination of a cause, the privilege must give way." Supra at 60-61. This Court stated that, in determining the applicability of the informant's privilege, a trial court should balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." Supra at 67.

Petitioner contends that in this case the District Court missapplied the Roviaro balancing test and committed reversible error in prohibiting the disclosure to the jury of the identity of the informant.[1/]

First, it appears that, in fact, there was no informant's privilege in this case at all. It was clear at the time of trial that petitioner knew the identity of the informant; indeed, the name and address of the informant was stated in open court.

This Court, in Roviaro, stated that "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." Id. at 60. The Court noted that if "the identity of John Doe was known to Petitioner . . . whatever privilege

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1/ Indeed the Court of Appeals expressed "serious reservations" concerning the way in which the District Court applied the balancing test. Jackson v. United States, U.S. Court of Appeals for the Sixth Circuit, 77-5375, December 28, 1978, Appendix B at 10b.

the government had would have ceased to exist . . . ." Id. at n.8. Therefore, at the time of trial, there was no informant's privilege, and the District Court committed clear error in preventing petitioner from disclosing the identity of the informant to the jury.

Furthermore, the petitioner's need for disclosure clearly outweighed whatever interest in non-disclosure there may have been. The stated interest of the Government in protecting the identity of the informant in this case concerned the informant's safety and his ability to continue working on certain ongoing investigations. While these governmental interests may preclude disclo ure of an informant's identity under certain circumstances, see United States v. Toombs, 497 F.2d 88 (5th Cir. 1974), it does not carry weight in the present case. The informant's name and address appeared on the public record.

Therefore, nondisclosure no longer served the governmental interest; presumably the harm the government wished to avoid already had occurred, since the identity of the informant was in the public record. The jury was prevented from learning who the informant was and what the petitioner wanted it to know about the informant.

Although petitioner did not intend to call the informant as a defense witness, he had a substantial interest in having the identity of the informant disclosed to the jury. Petitioner intended to present evidence that he was acquainted with the informant and that the informant was involved with narcotics. The trial court's ruling on Roviaro precluded petitioner from making his case regarding the informant. It is impossible to conclude that the error was harmless as the Court of Appeals concluded because the information never came to light. It would be to compound the trial court's error to argue now that this error was harmless.

The District Court, in ordering that the informant's identity not be disclosed to the jury, effectively prevented petitioner from calling witnesses and presenting the sole evidence in his defense. Petitioner contends that no informant's privilege existed, and that under the Roviaro balancing test, this ruling was reversible error. The harm to the petitioner's ability to present his defense far outweighed the government's interest in protecting the identity of an informant whose name and address was known to petitioner and appeared on the public record.

This is not a case in which alternative defenses were presented to the jury, nor is it a case in which petitioner's credibility was weighed by the jury against the credibility of a government witness. Petitioner's only defense was that the informant had prior unexplained dealings with the petitioner; the trial court's misapplication of the Roviaro test prevented petitioner from presenting information about these dealings, which was his only defense.

2. The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The Fourteenth Amendment has been deemed to incorporate this important right to defendants in state court trials, Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963), as the Sixth Amendment applies this right to federal trials.

This Court long has held that the Sixth Amendment requires more than simply having an attorney present to act on behalf of a defendant. The right to counsel is interpreted to mean the right to effective assistance of an attorney. Chambers v. Maroney, 399 U.S. 42 (1970); Powell v. Alabama, 287 U.S. 45 (1932). Otherwise the right to counsel would be a meaningless guarantee.

Furthermore, it is commonly accepted that the right to effective assistance of counsel pertains not only to counsel at trial, but

also to the right to competent representation in appellate litigation. Cantrell v. Alabama, 546 F.2d 652 (5th Cir.), cert. den. 431 U.S. 959 (1977); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); Chapman v. United States, 469 F.2d 634 (5th Cir. 1972); Bolton v. Nelson, 426 F.2d 807 (9th Cir. 1970), cert. den. 400 U.S. 996 (1971).

Generally, the issue of effective assistance of counsel on appeal is raised as part of a collateral attack on a conviction, after the conviction has been affirmed on direct appeal. Cantrell v. Alabama, supra; Beasley v. United States, supra; Chapman v. United States, supra; Bolton v. Nelson, supra. The present case comes to this Court directly from the appeal in which petitioner claims his Sixth Amendment rights were violated, rather than through a drawn-out collateral attack. Petitioner is not a disgruntled inmate making a long after-the-fact attempt to free himself. He has raised his claim of ineffective assistance of counsel at the first opportunity, and has brought his claim directly to this Court.

Although the right to effective appellate counsel is well established in all the Courts of Appeals, this Court has never addressed the issue directly.[2/] This case provides the Court with the unique and timely opportunity to consider this important question.

Petitioner's claim arises at a time when interests have been focused on the meaning and measure of the requirements for effective assistance of counsel. The Chief Justice has taken the lead in calling for improving the quality of the trial bar. Bar associations have increased their efforts at monitoring the quality of legal representation. Public perceptions of the justice system are poor, recent national surveys show. The time has come for meaning to be added to the words of the Sixth Amendment.

2/ In Anders v. California, 386 U.S. 738 (1967), this Court held that denying an indigent defendant an effective appellate advocate did not "comport with fair procedure and lack[ed] that equality that is required by the Fourteenth Amendment." Id. at 741.

This case presents the Court with the opportunity to define the standards required by the Sixth Amendment regarding "effective counsel" at the appellate stage of the trial process. Condemnation of faulty lawyers at bar proceedings may root out incompetence, as would continuing education requirements; but they do not redress the defendant whose justice was denied because his appellate counsel was ineffective. Only a meaningful review on Sixth Amendment grounds would accomplish this crucial need.

For this aspect of the Sixth Amendment to be real and functional, it is necessary for this Court to define its meaning and to state ground rules. Care must be taken to balance a defendant's proper right to meaningful review with the need to protect attorneys from false and recriminatory claims by defendants who are disgruntled about the outcome of their cases and who may be reckless in their claims.

It is not enough to enunciate that defendants have a constitutional right. To date, this is all this Court has done. What is necessary now is a clear decision stating the specific standards or measures of the meaning of that constitutional right. This case provides the Court with an appropriate situation in which to deal with this issue; to provide guidance to lawyers and clients alike, and to give specific meaning to a generally worded but important constitutional guarantee.

The best evidence of the merit of petitioner's claim of ineffective assistance of counsel is in the brief filed for him by his attorney on appeal. Petitioner respectfully requests that this Court review the brief submitted on appeal. Exhibit I, lodged with the Clerk of the Court, infra. Appellate counsel simply incorporated 60 pages of the trial transcript, without discussion of their relevance. In citing case law, the brief is nothing more than a verbatim reproduction of

case syllabi, case reporter head notes, or portions of court decisions. There is no attempt to synthesize the principles of the cited cases into an effective argument. Although the brief cites Roviaro v. United States, supra, there is no mention of that part of the decision which is most important to the case at hand: the statement that the informant's privilege ceases to exist when the petitioner knows the identity of the informant.

Counsel in this present petition has been hampered in preparing an appeal to Point I because of the inadequate work of counsel below. Petitioner has filed a claim against his counsel below before the Michigan Bar Association; that claim is pending. No redress that the Bar Association can afford petitioner will get to the heart of the problem -- that his appeal was prejudiced by his lawyer's inadequacies. Only this Court can provide

petitioner with appropriate relief -- a reversal of the affirmance on appeal, and a remand to the United States Court of Appeals for the Sixth Circuit for proper briefing and argument.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 26, 1979

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Petition for a Writ of Certiorari was mailed, postage pre-paid, this 26th Day of February, 1979, to Office of the Solicitor General, United States Department of Justice, Room 5614, 10th and Constitution Avenues, N.W., Washington, D.C. 20530.

Ronald L. Goldfarb

Ronald L. Goldfarb

APPENDIX A

APPENDIX A

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX B

THE COURT: In the form in which the motion is made, I will deny it. It is made untimely in the sense that the jury has been empanelled and jeopardy has attached. The Government's right to appeal the order of the Court no longer exists.

So, I think the question of timeliness has some significance in this particular case. Frequently, the question of timeliness is insignificant to the matter. The motion is for the identity of the informant which the defendant has stated he knows. I don't think he's made the strong showing that would be required that the Government disclose the identity of the informant.

So, I'll deny the motion.

VOL. I - 13 -

* * * * *

THE COURT: During the recess, I found the case I was looking for, which was United States v. Craig, 477 F.2d 129 (1973, 6th Cir.).

In that case, the testimony indicated that the informant was present on various occasions which was the subject matter of the testimony in the narcotics case and on at least one occasion, the informant handled the money to pay it over to the defendant. The Court of Appeals held that the Government was not required to produce the informant under those circumstances.

Again, in United States v. Stevens, 521 F.2d 334 (1975), objection was made that the Government did not call a witness who was, "A cooperating witness", in a case where the defendants sought to present the defense of entrapment. It is true that in that case the defendant did not complain of the failure of the Government to produce that witness at the time of trial, but was complaining, first, at the time of appeal.

However, the court did quote with approval from United States v. Craig and reaffirmed that that was still the law of this Circuit. It should be noted that in Craig, there was a request by the defendant that that witness be produced.

It appears clear, therefore, that the Government is not required to produce the informant.

The next question is whether the Government is required to reveal the identity of the informant and in view of the defendant's statement that he's fully aware of that identity, the Court would not require that the Government reveal the identity since there is no showing of a need in that regard. It appears what the defendant seeks is a stipulation of the identification of the informant; in other words, the presentation of that evidence to the jury, of the identity of the informant. No law has been cited

to the Court that the Government enter into such a stipulation and the court does not -- cannot think of anything analogous within its experience that would require the Government to enter into a stipulation of fact in a criminal case.

So, I'll not order the Government to do so.

* * * * *

THE COURT: At the end of the court session yesterday, the Court stated that it would have an in camera hearing which has been held.

The Court has left before it, at this time for a decision, the question whether the Government will be required to disclose the identity of the informant; whether the Court would require the Government to make that disclosure.

In Roviaro v. United States, 353 U.S. 53 (1957), the United States Supreme Court dealt with the issue. In that particular case, the Government's informant was the sole participant,

other than the accused in the transaction that was involved. In that regard, that case differs from the instant case.

In the discussion by the Supreme Court, whether the Government would be required to disclose the identity of the informant, the Supreme Court said, "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." That's at page 62.

Further, it appears the burden is on the defendant to show the need for the disclosure; see United States v. McLaughlin, 525 F.2d 517 (CA 1975).

After discussing Roviaro, the court, in United States v. Alvarez, 472 F.2d 111, at 113, (CA 1973), cert. denied 412 U.S. 921, through Judge Kilkenny, stated in balancing these competing interests, [the public interest in protecting the flow of information against the individual's right to prepare his defense], "The burden of proof is on the defendant to show need for the disclosure, United States v. Kelly, 449 F.2d 329, 330 (CA 1972)." I didn't give the date for cert denied, it was 1973.

Balancing, then in this case, the interest of the public in protecting the flow of information, the Court finds that there is good reason for the Government not to disclose the identity of the informant and further finds that the defendant here, since he states he does know that identity, has the address of the informant and does not seek to call that person as a witness, has in the Court's opinion, failed to show any significant need for the disclosure.

The Court, therefore, will not require the Government to disclose that information.

* * * * * * *

77-5375

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appelllee

V.

WILLIE JAMES JACKSON,

Defendant-Appellant

ORDER
Filed Dec. 28, 1978
John P. Hehman,
Clerk

Before: ENGLE and MERRITT, Circuit Judges and PECK, Senior Circuit Judge

Appellant Willie James Jackson was convicted in a jury trial of possession with intent to distribute approximately 140 grams of phencyclidine (PCP), a Schedule III controlled substance, and with distribution of the PCP, all in violation of 21 U.S.C. § 841(a)(1). The charges arose out of an incident of October 13, 1975, when undercover Drug Enforcement Agent James Stepp, with an unnamed informer, met the defendant at a private residence in Detroit, at which time the transaction took place. Agent Stepp testified at the trial but when counsel for the appellant sought to elicit the name of the informer, the government

objected, invoking the informer privilege. Relying on the balancing test in Roviaro v. United States, 353 U.S. 53 (1957), and after in camera proceedings in which Agent Stepp explained his reasons for invoking the privilege, the district judge upheld the government's objection.

Upon appeal, Jackson asserts that he was denied his constitutional right to confront, not the informer but Agent Stepp, when the court refused to permit Stepp to be questioned concerning the informer's identity. It was Jackson's claim that he was entitled to elicit from Stepp the identity of the informer so that he might have shown, in some way, that he was entrapped. At the same time his counsel freely acknowledged that Jackson, in fact, knew the identity of the informer and declined to pursue his original efforts to subpoena him. Nothing in the record suggests any realistic possibility of benefit to the defense from requiring the answer. Cross-examination was not restricted in any way, and Jackson was not impeded in any effort to call

the informer as a witness if he so desired. While the court entertains serious reservations concerning whether the balancing test of Roviaro was properly applied here, it is convinced that any error was in all events harmless beyond a reasonable doubt. The court finds no merit in the other claims of error raised in this appeal. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

No. 78-1324

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIE JAMES JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1324

WILLIE JAMES JACKSON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in failing to require the government to disclose the identity of a government informant whose identity petitioner already knew. Petitioner also contends that he did not receive effective assistance of counsel in the court of appeals.

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on a two-count indictment charging possession with intent to distribute, and distribution, of approximately 140 grams of phencyclidine (PCP), a schedule III controlled substance, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent terms of three years' imprisonment with a special parole term of two years. The court of appeals affirmed by judgment order (Pet. App. 8-b to 10-b).

As summarized in the opinion of the court of appeals (Pet. App. 8-b to 9-b), the evidence showed that on October 13, 1975, undercover Drug Enforcement Agent James Stepp was introduced to petitioner by an unidentified government informer, who had no further part in the transaction. Agent Stepp brought sufficient funds with him to that meeting to purchase 5,000 units of PCP (I Tr. 20-24).[1] Petitioner, who told Stepp that he frequently dealt in such quantities, had a 5,000 unit package of PCP on hand, which he sold to the agent (I Tr. 21-22). Petitioner was arrested several months later.

Both prior to and during the trial, petitioner requested an order directing the government to stipulate that the informant's true identity was Robert Payne (I Tr. 10-14). The government refused to concede that Robert Payne was in fact the informant and requested the district court to hold a hearing *in camera* to determine whether disclosure would be required (I Tr. 71-73).[2] After the hearing, it was determined that petitioner knew the informant by name (II Tr. 65), had no intention of calling him as a witness, had failed to secure Payne's presence by subpoena (II Tr. 58), and had requested disclosure of the informant's name only for the purpose of obtaining a jury instruction that unfavorable inferences of entrapment should be drawn from the failure of the

[1]"Tr." designates the trial transcript. "Supp. Tr." designates the transcript of the *in camera* hearing.

[2]At the hearing it was determined that there was a substantial risk of death to the informant if his identity was officially disclosed on the record (Supp. Tr. 4-6).

government to produce the informant (I Tr. 83-93; II Tr. 126-130).[3] As the court noted in refusing to order disclosure, the defendant claimed already to know the informant's identity, and he thus appeared to be equally accessible as a witness to both sides (I Tr. 92-93; II Tr. 75). Since petitioner had shown such slight need for the informant's name, and since the government opposed formal disclosure of his identity on the grounds that future prosecutions (as well as the safety of the informant) would be jeopardized, the district court ruled (II Tr. 74-76) that disclosure was not compelled under this Court's decision in *Roviaro* v. *United States*, 353 U.S. 53 (1953).

2. Since petitioner claimed to know the informant's identity and nonetheless refused to call him as a witness, the court of appeals correctly concluded (Pet. App. 10-b) that any error in applying *Roviaro* in this case—and we submit there was no error—was harmless beyond a reasonable doubt. The requested public naming of the informant by the prosecution in this case was irrelevant to the defendant's ability to present his defense by calling and examining the informant as a witness.[4] The defendant offered no evidence of any kind to support any claim of entrapment or prosecutorial misconduct. Where, as here, the defendant claims to know the identity of the informant and it is not shown that the informant's appearance at trial is in any way material to the defense,

[3]Defense counsel conceded at trial that no evidence of entrapment existed, but stated it was his intention nevertheless to "go to the jury with every inference raised from his absence and closeness to this defendant * * *" (I Tr. 91). Counsel also stated that he wished to cross-examine Agent Stepp by confronting him with the theory of entrapment (II Tr. 44-45).

[4]The government located Robert Payne's address for the defense and the court offered a continuance, but the defense still refused to subpoena him as a witness (II Tr. 56-59).

no showing of prejudice to the defense is made, and reversal of a conviction is inappropriate. *United States* v. *Gonzalez*, 555 F. 2d 308, 314 (2d Cir. 1977). Cf. *United States* v. *Brown*, 562 F. 2d 1144, 1151 (9th Cir. 1977).

In any event, the refusal to disclose the informant's identity in this case was entirely proper. In *Roviaro*, the Court held that whether an informant's identity must be disclosed turns on a balancing of the needs of law enforcement and the individual's interest in a fair trial. 353 U.S. at 62. The Court noted that this balancing necessarily must be resolved on the particular facts of each case. *Ibid.* In this case, the facts showed that premature disclosure of the informant's identity would seriously threaten both the informant's survival and the government's success in subsequent prosecutions and would provide no material benefit to the defendant. The district court thus correctly ruled that the balance of interests supported the government's refusal to disclose the informant's identity. See *United States* v. *Anderson*, 509 F. 2d 724, 729-730 (9th Cir. 1974), cert. denied, 420 U.S. 910 (1975); *United States* v. *Brown*, *supra*, 562 F. 2d at 1148-1149.[5]

3. Petitioner further contends that he was deprived of the effective assistance of counsel on his appeal because, *inter alia*, counsel did not argue that "the informant's privilege ceases to exist when the petitioner knows the identity of the informant" (Pet. 18). It

[5]See also *United States* v. *Alonzo*, 571 F. 2d 1384, 1387 (5th Cir. 1978) (informant only viewed transaction and did not participate; disclosure not required); *United States* v. *Estrella*, 567 F. 2d 1151, 1152-1153 (1st Cir. 1977) (informant arranged and witnessed transaction between accomplice and agent but never dealt directly with defendant; disclosure not required); *United States* v. *McManus*, 560 F. 2d 747, 749, 751 (6th Cir. 1977), cert. denied, 434 U.S. 1047 (1978) (informant introduced agent to defendant's middleman but was not direct participant in drug transaction; disclosure not required).

should be noted initially that petitioner's premise lacks any factual foundation, because the government had never conceded that Robert Payne was in fact the informant. But even if he were, petitioner's argument is without merit because the purpose of nondisclosure here was not to conceal the informant's identity from petitioner, but from participants at subsequent trials. See *Roviaro* v. *United States*, *supra*, 353 U.S. at 58 n.5, 59. In any event, it has never been held that counsel is ineffective merely because all subtle variations of the defendant's legal position have not been aired in prior proceedings. Indeed, if this were the standard of ineffective counsel, it is questionable whether orderly judicial procedure could be maintained. For example, the rule that an objection is waived if not timely raised at trial (and other similar issue-foreclosure rules) would be placed in doubt.

Petitioner's remaining contentions relate to the form of the appellate brief. While the 78-page brief filed by petitioner's counsel may have been inartfully drawn, it nonetheless incorporated substantially all of the relevant proceedings at trial and served to acquaint the appellate court with the defense's positions on the legal issues in the case. The brief also made reference to the major cases relevant to those issues. In these circumstances, it cannot be said that the defendant lacked an "active advocate" (*Anders* v. *California*, 386 U.S. 738, 744 (1967)) or was unconstitutionally deprived of the effective assistance of counsel.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

DOJ-1979-04